No. 06-1159

IN THE

Supreme Court of the United States

KAUFMAN'S CAROUSEL, INC., AND
LORD & TAYLOR CAROUSEL, INC.,

Petitioners,

v.

CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY
AND CAROUSEL CENTER COMPANY, L.P.,

Respondents.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, Fourth Department

BRIEF IN OPPOSITION OF RESPONDENT CAROUSEL CENTER COMPANY, L.P.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Carousel Center Company, L.P. states that it is a limited partnership organized under New York law. The general partner is Carousel General Company, LLC, and the limited partner is Carousel Enterprises Company, LLC. No publicly held corporation owns 10% or more of the stock of either partner.

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INTRODUCTION

The petition purports to present a question involving the "public use" provision of the Takings Clause of the Fifth Amendment to the United States Constitution. *See* Pet. i. But this case does not actually present that question. Petitioner never raised that federal constitutional question in the state court proceedings below, and the state courts below accordingly did not address that question. Indeed, the "public use" dispute between these parties was resolved in an earlier proceeding (a so-called "Article 2" proceeding under New York eminent domain law), and even then petitioners raised only state-law (not federal) arguments. This separate proceeding (a so-called "Article 4" proceeding filed almost three years after the conclusion of the Article 2 proceeding) involves only the *scope* of the condemnation. Accordingly, the petition is entirely contrived. Needless to say, this Court is not in the business of deciding federal constitutional questions that were neither presented to nor decided by the state courts below.

In any event, the petition does not warrant review on the merits. Given that the courts below were not asked to decide, and did not decide, any issue of federal constitutional law, petitioners obviously cannot and do not allege that the decision below created or deepened a conflict on an issue of federal constitutional law. Essentially, petitioners do not like this Court's decision just two years ago in *Kelo v. City of New London*, 545 U.S. 469 (2005). But petitioners provide no reason for this Court to revisit *Kelo* so soon, least of all in a case in which no *Kelo* issue was raised or decided below.

COUNTERSTATEMENT OF THE CASE

This case involves "one of the largest economic development projects in the history of the State of New York," Pet. App. 27a: the plan by respondent Syracuse Industrial Development Agency (SIDA) to create a major shopping and tourism destination, DestiNY USA, on a

brownfield site in Syracuse. An important component of that project is the expansion and redevelopment of an existing shopping center, the Carousel Center. Respondent Carousel Center Company, L.P. owns that shopping center; petitioners Kaufman's Carousel, Inc., and Lord & Taylor Carousel, Inc. are tenants.

A. The Article 2 Proceeding

In order for the project to succeed, SIDA determined that it would need to acquire two general categories of property interests: (1) "right-of-way interests" (*i.e.*, property that would allow access to the project site), and (2) "Carousel Center interests" (*i.e.*, property interests of Carousel Center tenants that conflicted with the project). Pet. App. 28a. Under New York's Eminent Domain Procedure Law (EDPL), SIDA could not acquire these property interests without first determining that "a public use, benefit or purpose will be served by the proposed acquisition." N.Y. Em. Dom. Proc. Law § 207(c)(4).

After a public hearing, SIDA issued the requisite determination and findings in April 2002. Pet. App. 28-29a. Among other things, SIDA concluded that "the acquisition of the Right-Of-Way Interests and the Carousel Center Interests will help achieve the public purposes, uses and benefits expected to be derived from the DestiNY USA Project, as previously determined by SIDA ... and will independently help achieve the purposes, benefits and uses associated with the potential redevelopment of the Syracuse Lakefront." *Id.; see also id.* at 29a ("SIDA determined that numerous public purposes would be served, including advancing the general prosperity and economic welfare of both the residents of the City and the general population of the State, promoting tourism and attracting visitors from outside the economic development region, ameliorating economic deterioration and promoting employment in the City, and increasing the property tax base as well as sales tax revenues.").

Petitioners thereafter filed an original proceeding under EDPL Article 2 in the intermediate state appellate court, challenging SIDA's "public use" findings. Pet. App. 28-29a. In that proceeding, however, petitioners argued only that the proposed taking violated SIDA's authority under the EDPL; they raised no argument under the Takings Clause of the federal constitution.

A unanimous five-judge panel rejected petitioners' various challenges to SIDA's findings. Pet. App. 25-40a. Among other things, the appellate court explained that SIDA's determination that the proposed taking would serve a public use within the meaning of the EDPL "must be confirmed if the exercise of the eminent domain power is rationally related to a conceivable public purpose." Pet. App. 37a (internal quotations omitted). That test, the court held, was easily satisfied: "SIDA's stated purposes for the acquisition of petitioners' property support the determination that the DestiNY USA project serves a legitimate public purpose, and that the public purpose is dominant." Pet. App. 37-38a. Thus, it is immaterial whether the project would also benefit other private parties. Pet. App. 37a ("[An] incidental private benefit will not invalidate an agency's determination so long as the public purpose is dominant.") (brackets modified). Petitioners moved for leave to appeal to New York's highest court, the Court of Appeals, but that court denied and the Article 2 proceedings became final in early 2003. Petitioners did not seek review by this Court.

B. The Article 4 Proceeding

Almost three years later, in December 2005, SIDA initiated this proceeding under EDPL Article 4 by filing a petition seeking condemnation of specific property interests. Petitioners opposed that petition, arguing among other things that (1) the petition was untimely because it was not filed within three years of the intermediate appellate court's decision in the Article 2 proceeding, (2) the petition did not describe the

condemned property with reasonable specificity and exceeded the scope of SIDA's 2002 determination and findings, (3) the condemnation was unwarranted because the DestiNY USA project might not come to fruition, (4) SIDA's valuation of the rights taken was inaccurate.

The state trial court (Centra, J.) rejected petitioners' challenge, Pet. App. 9-16a, and the intermediate appellate court affirmed, *id.* at 1-6a. In particular, the appellate court held that (1) SIDA's Article 4 petition was timely, because the Article 2 proceeding did not become final until the Court of Appeals denied discretionary review in February 2003, *id.* at 3a, (2) "SIDA specifically identified the interests it seeks to acquire, and those interests are not vague and do not exceed SIDA's 2002 determination and findings," *id.*, (3) "the fact that a project may not ultimately come to fruition does not negate the power of eminent domain," *id.* at 4a, and (4) the trial court had not abused its discretion in determining the amount of the undertaking, *id.* at 4-5a. Justice Hurlbutt dissented, agreeing with petitioners that the Article 4 proceeding was untimely, *id.* at 5-6a, and (2) the property interests proposed to be taken "are not now ascertainable with reasonable certainty," *id.* at 6a. Petitioners unsuccessfully sought review by the New York Court of Appeals, and now file this petition.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present The "Question Presented."

As a threshold matter, this case simply does not present the "public use" issue set forth in the question presented. *See* Pet. i. Petitioners did not raise that federal constitutional issue at any stage of the proceedings below, and the state courts below did not decide any such issue. This Article 4 proceeding is about the *scope* of the proposed taking; any issues regarding the *validity* of the proposed taking (including "public use") were litigated in the earlier Article 2 proceeding. Even

the dissent below relied purely on state law, and did not address the federal constitutional argument that petitioners are now pressing. *See* Pet. App. 5-6a.

The earlier Article 2 proceeding was a completely separate and independent proceeding from this Article 4 proceeding; indeed, petitioners' lead argument below was that SIDA failed to bring this Article 4 proceeding within three years of the date the Article 2 proceeding became final. *See* Pet. App. 2-3a. And even in the earlier Article 2 proceeding, petitioners did not raise (and the state courts did not decide) any question involving the "public use" provision of the Takings Clause of the United States Constitution. Pet. App. 25-40a.

Thus, when petitioners sought review by the New York Court of Appeals in *both* this Article 4 proceeding *and* the earlier Article 2 proceeding, they expressly conceded that the intermediate appellate court's decisions are "*not* appealable as of right." Mot. for Leave to Appeal (10/4/06), at 5 (emphasis added); Mot. for Leave to Appeal (12/18/02), at 3 (emphasis added). That concession is significant because, under New York law, "[a]n appeal *may* be taken to the court of appeals as of right ... where there is directly involved the construction of the constitution of the state or of the United States." N.Y. C.P.L.R. § 5601(b)(1) (emphasis added); *cf.* N.Y. C.P.L.R. § 5602(a)(1) (appeal by permission may be taken only if the appellate decision "is not appealable as of right"). By acknowledging that they could not appeal as of right, in other words, petitioners themselves have already acknowledged that this case does not directly involve any federal constitutional question.

It follows that this Court lacks jurisdiction over this case. Petitioners have invoked this Court's jurisdiction under 28 U.S.C. § 1257(a), which authorizes this Court to review decisions from state courts where, among other things, "any title, right, privilege or immunity is ... claimed under the Constitution ... of ... the United

States." As the leading treatise explains, a party invoking this Court's jurisdiction under § 1257(a) has the burden of showing that a federal question presented to this Court "has been *either* raised in the state court *or* considered and resolved by the state court." Robert L. Stern *et al.*, *Supreme Court Practice* § 3.18, at 175 (8th ed. 2002) (emphasis in original); *see also id.* at 183 ("It is too late, of course, to raise the federal question for the first time in the petition for certiorari."). Where (as here) "the highest state court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the *high burden* of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." *Id.* at 175 (emphasis added); *see also Street v. New York*, 394 U.S. 576, 582 (1969) ("[When] the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."). Petitioners have not shown, and cannot show, that they either raised the federal constitutional "public use" issue below or the state courts addressed that issue.

Petitioners thus fail to satisfy their obligation under this Court's Rules to:

> specif[y] ... the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the

> federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

S. Ct. R. 14.1(g)(1). Although petitioners assert that they "challenged SIDA's authority to condemn their contract rights" in the courts below, Pet. 10, they cannot and do not say that such a challenge included the federal constitutional question presented in the petition. To the extent that "[p]etitioners contended that no public purpose was served and that no authority justified the excision of many rights," *id.*, they did not base that contention on the federal constitutional question they now seek to raise.

Indeed, it is telling that the most that petitioners can say, with respect to having raised that question below, is that their motion for discretionary leave to appeal in the New York Court of Appeals "cited *Kelo v. City of New London*, 545 U.S. 469, contending that the taking at issue here is far more novel and breath-taking." Pet. 11. But that motion did not raise the federal constitutional question presented in the petition. Rather, the motion sought review of the state-law issues presented to, and addressed by, the lower courts in this case, and cited *Kelo* only in support of an argument about the "*policy implications* of SIDA's exercise of eminent domain." Mot. for Leave to Appeal (10/4/06), at 15 (emphasis added; capitalization modified). Needless to say, such an offhand reference in an unsuccessful petition for discretionary review is not remotely sufficient to trigger this Court's jurisdiction to decide a federal question neither presented to, nor decided by, any of the lower state courts. Even if petitioners had actually included a federal constitutional issue in their motion for leave to appeal in the New York Court of Appeals (which they did not), that would not suffice to trigger this Court's jurisdiction:

> Where a federal question is initially raised in a petition or assignment of errors filed in the highest state court, which refuses to consider any issue not presented to the trial court, the jurisdiction of the Supreme Court cannot attach. Only if the highest state court actually considers and disposes of a question so raised can Supreme Court review be obtained.

Stern *et al.*, *supra*, § 3.18, at 181 (citations omitted).

And even putting aside the jurisdictional problem, this case hardly presents an appropriate vehicle for deciding the federal constitutional issue set forth in the petition. Needless to say, not every case within this Court's jurisdiction presents an appropriate vehicle for reviewing a federal question. To the contrary, this Court's Rule 10 explains that the Court will exercise its certiorari jurisdiction in cases arising from state courts only where, among other things, "a state court of last resort has *decided* an important federal question ..." or "a state court ... has *decided* an important question of federal law ...." S. Ct. R. 10(b), (c) (emphasis added). Here, no state court below "has decided" any federal question at all. That omission is not surprising, because petitioners presented no such question below. *See* Stern *et al.*, *supra*, § 3.18, at 175 ("[A] failure to raise a federal question often accounts for the failure of the state court to decide the matter.").

II. The "Question Presented" Is Not Worthy Of Review In Any Event.

In any event, the petition does not warrant review on the merits. In essence, petitioners do not like this Court's recent decision in *Kelo* reaffirming that a governmental entity's "public use" determination is subject only to rational-basis review by the courts. *See Kelo*, 545 U.S. at 481-83; *see also id.* at 490-91 (Kennedy, J., concurring); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Petitioners contend that "there is confusion and

conflict among the [lower] courts regarding how to define and analyze public use in these circumstances." Pet. 22 (capitalization modified). They are wrong.

As an initial matter, petitioners cannot establish that the decision below created or exacerbated confusion on an issue of federal constitutional law when the decision below did not decide any such issue. Thus, petitioners' assertion that "[s]ome courts, *like the New York courts here*, ... have allowed the government free rein to use its eminent domain authority" in violation of the Takings Clause, is inexplicable, because the New York courts here addressed no federal constitutional issue. Pet. 22 (emphasis added); *see also id.* at 23 (alleging that an "opinion by the Rhode Island Supreme Court [on the federal constitutional issue] simply cannot be squared with the New York courts' decisions in this case").

In any event, this Court just denied review in a case (unlike this one) that actually presented the "public use" issue that petitioners here purport to present. *See Didden v. Village of Port Chester*, 173 Fed. Appx. 931, 933 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1127 (2007) (No. 06-652). If this Court saw no reason to grant review in a case that presented the constitutional question alleged here, there is certainly no reason to grant review in a case that does not present that question.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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